No. 78-693

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH M. BANE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 583 F.2d 832. The opinion of the district court (Pet. App. A9-A29) is reported at 433 F. Supp. 1286.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1978. Mr. Justice Stewart extended

the time for filing a petition for a writ of certiorari to and including October 24, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a conviction for conversion of union funds in violation of 29 U.S.C. 501(c) can stand upon proof of bad faith payment of a union organizing subsidy to a man who did no organizing, in the absence of an instruction that the jury had to find that the payments in fact resulted in no benefit of any kind to the union.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of willfully embezzling, stealing, and converting to the use of another approximately $37,700 of Teamsters Union funds over a period of three years, in violation of a provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 501(c).[1] Petitioner was sentenced to two years' probation, fined $10,000, and ordered to perform 1000 hours of public service. The court of appeals affirmed (Pet. App. A1-A8).

[1] The jury also convicted petitioner on six counts of mail fraud. It acquitted him on another mail fraud count and on a conspiracy count. The district court set aside the jury's verdict on the mail fraud convictions because it had improperly charged the jury on the elements of that offense (Pet. App. A14-A17). William Hoffa was named in the indictment as petitioner's co-defendant and co-conspirator, but he died in July 1976, prior to trial (X Tr. 83).

On February 13, 1967, petitioner, President of Local 614 of the International Brotherhood of Teamsters (IBT), sent a letter to Jimmy Hoffa, General President of the IBT, requesting a subsidy in the amount of $1000 per month to hire an experienced organizer. Hoffa granted the subsidy for six months, subject to renewal, and petitioner thereupon hired Jimmy Hoffa's brother, William, for the job (G. Exs. 1, 1A, 1B; I Tr. 2-9; IV Tr. 47-48; XII Tr. 56-57). Thereafter, every month petitioner submitted to the IBT an "accounting-for-funds" form showing that the subsidy was used to pay William Hoffa for the purpose of "organizing" (II Tr. 24-25, 45-55; XII Tr. 58-65; G. Exs. 69-106). As a prerequisite to renewal of the subsidy, petitioner was also required to submit a monthly organizing report on which he listed the companies that were being organized. At petitioner's request the subsidy was renewed by either Jimmy Hoffa or his successor, Frank Fitzsimmons, every six months until William Hoffa retired in January 1974.

Although William Hoffa was paid to organize and petitioner always indicated on forms he submitted to the IBT that Hoffa was performing that function, Hoffa did not in fact organize or attempt to organize any nonunion companies from November 1970 to December 1973, the period covered by the indictment (Pet. App. A2).

The evidence showed that Hoffa, unlike the other organizers, never requested reimbursement for orga-

nizing expenses after November 1970. No business-agent organizer for Local 614 worked with Hoffa on any organizing activity during the period of the indictment (Tr. Volumes V, VI, VII *passim*). Indeed, with one exception,[2] none ever worked with Hoffa on any union business during that period, and some were even unaware that Hoffa held a position as organizer in Local 614. Unlike other organizers, Hoffa never submitted monthly organizing reports[3] or reported on his activities before the Local's Executive Board. Petitioner admitted at trial that he did not know if Hoffa had engaged in any organizing activity (XII Tr. 74). Several employees from each company that, Hoffa was purportedly organizing, according to the reports submitted by petitioner to the IBT, testified that Hoffa did not participate in the organizing efforts at their businesses (Tr. Volumes VII, VIIIA, VIIIB, IX *passim*).

At trial petitioner presented two defenses: (1) that Hoffa was too sick to work during the period in question but was paid pursuant to an informal sick pay policy, and (2) that Hoffa performed a variety of

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[2] Union organizer John Walker testified that he once went with Hoffa to Price Brothers, a company that was already organized, to speak to a dissatisfied union employee, Felix Maslowsky, Hoffa's tenant for 20 years (VI Tr. 45). Maslowsky had personally requested that Hoffa, his landlord, assist in the grievance (VI Tr. 45, 48-49; XI Tr. 102-104).

[3] Petitioner admitted that to perpetuate the subsidy from the IBT, Hoffa was required to submit to the Local detailed reports on his organizing activities but did not do so (XII Tr. 58).

functions for the union, although none of those functions was organizing (Tr. Volumes X-XII *passim*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals, because no other court has confronted the question presented here. Hence review by this Court is not warranted.

1. Section 501(c) of Title 29 was enacted in large part to punish union officers for willful breaches of their fiduciary duty to spend union funds in the best interest of the union membership.[4] S. Rep. No. 187, 86th Cong., 1st Sess. 6, 12 (1959). That section imposes criminal sanctions on whoever "embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer * * *." The courts have broadly construed the statute to effectuate Congress' intent to protect union resources from misapplication. *United States* v. *Nell*, 526 F.2d

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[4] Section 501(a) defines the fiduciary responsibility of officers of a labor union to the union and its members as a duty to hold the union's property solely for the benefit of the union and to expend it only in accordance with its constitution, by-laws and resolutions. Section 501(c) is not, however, restricted to willful breaches of a fiduciary obligation; it also covers traditional common law larcenies for which no fiduciary relationship need be established. See *Colella* v. *United States*, 360 F.2d 792, 799-800 (1st Cir.), cert. denied, 385 U.S. 829 (1966).

1223, 1232 (5th Cir. 1976); *United States* v. *Goad*, 490 F.2d 1158, 1161 (8th Cir.), cert. denied, 417 U.S. 945 (1974); *United States* v. *Silverman*, 430 F.2d 106, 126 (2d Cir. 1970), modified, 439 F.2d 1198, cert. denied, 402 U.S. 953 (1971).

Petitioner essentially contends (Pet. 8-11) that where payment of union funds has been authorized by union officers, no violation of this section may be found unless the government proves that the payment in no way benefited the union, even if there is proof beyond a reasonable doubt that the union officer who paid out the funds acted with fraudulent intent and did not in good faith believe that the expenditure had any legitimate union purpose. As the court of appeals noted (Pet. App. A6-A7), such a construction of the provision "could absolve a defendant of liability when an otherwise fraudulent appropriation of funds fortuitously had some beneficial effect upon the union."

The construction given Section 501(c) by both courts below is more in keeping with the congressional intent of deterring union officers from committing breaches of their fiduciary duty. And, contrary to petitioner's suggestion (Pet. 10-11), it does not permit a union officer to be convicted merely for poor business judgment. As the court of appeals explained, the government must, in a case involving an authorized expenditure of union funds, prove that the "defendant had a fraudulent intent to deprive the union of its funds and, second, that the defendant lacked a good faith belief that the expenditure was

for the legitimate benefit of the union" (Pet. App. A6; footnote omitted).[5] The instructions to the jury in this case, approved by the court of appeals (Pet. App. A7-A8), explained good faith belief as meaning a "state of mind denoting honesty of purpose, freedom from intention to defraud" and "[g]enerally speaking, * * * being faithful to one's duty or obligation" (Pet. App. A7 n.11).[6]

By treating an expenditure's lack of actual benefit to the union as a factor relevant to the question of a defendant's intent in making the expenditure rather than as an element of a Section 501(c) offense, the court of appeals did not, as petitioner contends, "place[] on the defendant the burden of proving the existence of [a union] benefit" (Pet. 9). A defendant's burden under the court's test is only to refute the evidence by which the prosecution meets its burden—namely evidence from which a jury might conclude beyond a

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[5] The district court took out of the case the question of lack of authorization, whether as an element of the offense or as a factor bearing on intent. It observed that "the government admits that the subsidy was authorized" (Pet. App. A17) and instructed the jury accordingly. This, however, exaggerates the substance of the government's concession. The government conceded that the IBT had authorized a subsidy for paying a Local 614 organizer; it did not concede that paying the funds to someone who did no organizing was authorized (XIV Tr. 8-9, 12, 32).

[6] As this portion of the instructions suggests, the second part of the test formulated by the court of appeals—lack of a "good faith belief that [an] expenditure was for the legitimate benefit of the union"—may simply be a more specific formulation of the first—"fraudulent intent."

reasonable doubt that the defendant had expended union funds fraudulently, without a good faith belief that the expenditure was for the legitimate benefit of the union. In attempting to rebut the prosecution's case, a defendant may—but is not required to—introduce evidence that the expenditure actually benefited the union in some way. He may also seek to show that the circumstances in which the expenditure was made were such that, even though no benefit ultimately accrued to the union, he could have reasonably believed that he was paying out the funds for a legitimate union purpose. In either case, the question for the jury is properly whether, from all the facts adduced, the defendant expended the funds with the requisite unlawful intent. See *Morissette* v. *United States*, 342 U.S. 246, 274 (1952).

In the present case the jury resolved that question against petitioner, and the evidence amply supports that verdict. It shows that from 1970 to 1973 petitioner regularly applied to the IBT for subsidies to be used for organizing nonunion companies and approved the payment of those subsidies to a man who did no organizing. The jury could reasonably have rejected petitioner's defense that the expenditures were legitimate grants of "sick pay," in light of evidence that this purpose had never been disclosed on any of the union records pertaining to the subsidies and that evidence proffered by petitioner himself suggested that the recipient of the subsidies was not too sick to put in an occasional appearance at union offices and to engage in activities other than those for which he was supposedly being paid.

2. Petitioner contends (Pet. 11-13) that there is conflict among the circuits on the question presented in this case. The contention is erroneous because the other circuits have not faced the question.

In *Colella* v. *United States*, 360 F.2d 792, 804 (1st Cir.), cert. denied, 385 U.S. 829 (1966), the only case that petitioner specifically cites as a conflicting decision, the First Circuit merely approved a jury charge attacked by the defendant for an omission that has no bearing on the issue here. The conviction in *Colella* was affirmed, not reversed for any defect such as petitioner claims was present here; thus, the case plainly does not show that the First Circuit would have reversed petitioner's conviction.[7]

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[7] The issue in *Colella* was whether the trial court should have added the words "whether such expenditures were or were not authorized" to a portion of its charge relating to the spending of money for union purposes. The court of appeals held that those words were unnecessary because "[i]n either case if the jury felt that the defendant had spent for a union purpose, albeit unauthorized, they were to find him not guilty" (360 F.2d at 804). Even if one were to elevate dictum to holding here, it is doubtful whether *Colella* can be construed as support for petitioner's position. The use of the phrase "spent for a union purpose" is at least as consistent with the view that a Section 501(c) offense is made out by proof that the expenditure was made fraudulently, without a good faith belief it would benefit the union, as it is with the view that lack of actual benefit to the union is an element of the offense. In *United States* v. *Sullivan*, 498 F.2d 146, 148-149 (1st Cir. 1974), which petitioner cites as proof that "*Colella* still represents the law on this subject in the First Circuit" (Pet. 12), the First Circuit cited *Colella* with approval on the question of what, if anything, must be shown regarding a defendant's fiduciary relationship to his union. This question also is not involved in the instant case.

Similarly, in none of the cases cited by petitioner from other circuits was the court required to decide whether, in order to establish a violation of Section 501(c), the government must prove lack of union benefit once an expenditure has been shown to be authorized.[8] The source of the test petitioner proposes is, in fact, dictum in the dissenting opinion in *United States* v. *Silverman*, *supra*, 430 F.2d at 114, which obviously creates no conflict requiring resolution by this Court.

[8] In *United States* v. *Ottley*, 509 F.2d 667, 671 (2d Cir. 1975), the court reversed a Section 501(c) conviction because the district court "unduly limited the jury's consideration of criminal intent" by instructing the jury that the two central questions were whether the expenditure in question had been authorized or whether the defendant had a good faith belief that he was authorized to make the expenditure. The court agreed with the defendant that the jury should have been asked to decide whether he "in good faith believed that [a union-leased] automobile was being used for union business *and* that the union had authorized the expenditure or would ratify it * * *." *Ibid.* (emphasis in original). In *United States* v. *Santiago*, 528 F.2d 1130, 1133-1134 (2d Cir.), cert. denied, 425 U.S. 972 (1976), the defendant merely argued that "the Government's proof did not sufficiently preclude the possibility of subsequent ratification" of the expenditures at issue. The court disagreed and concluded that he was properly convicted under the *Ottley* good-faith-belief test. Although *United States* v. *Goad*, *supra*, 490 F.2d at 1164-1165, and *United States* v. *Nell*, *supra*, 526 F.2d at 1232, by implication support petitioner's position that the government must prove lack of benefit to the union if the expenditure in question is authorized, both cases hold only that the government need not prove lack of union benefit in the case of unauthorized expenditures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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